

**VIA United States Mail and Electronic Mail**

January 16, 2007

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RE: Comments on Tentative Waste Discharge Requirements General  
Order for Existing Milk Cow Dairies

Dear Ms. Lowry:

These comments to the Tentative Waste Discharge Requirements General Order for Existing Milk Cow Dairies ("Tentative WDR") are submitted on behalf of Baykeeper, Waterkeeper Alliance, Inc., Sierra Club, California Sportfishing Protection Alliance, Center on Race Poverty and the Environment, the Community Water Center, and Lawyers for Clean Water, Inc.. Many of these groups have submitted additional comments. Rather than repeat those comments here, we will simply state our support for and adopt those comments in this letter by reference. Questions regarding the issues addressed in these comments should be directed to Drev Hunt at Lawyers for Clean Water, Inc.

We'd like to first thank staff and the Regional Water Quality Control Board for the Central Valley Region ("Regional Board") for taking on the monumental, though essential, task of issuing a cohesive set of waste discharge requirements to an industry that has gone largely unregulated in California. The costs of this lack of regulation are abundant and widespread as evidenced by the many reports considered by staff in developing the Tentative WDR and the Information Sheet and the Findings in the Tentative WDR itself. The time and effort staff has put in developing the Tentative WDR is respected and nothing in these comments is intended to disparage the hard work that they have put in over the last several years.

These comments identify the requirements of the Federal Water Pollution Control Act ("Clean Water Act") and the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") that the Regional Board is obligated to comply with when issuing a permit that regulates discharges to surface waters. Addressed below are the legal requirements set forth in both Federal and State law that compel the Regional Board to issue an NPDES permit that builds upon the foundation developed by the Tentative WDR. Following the legal analysis, we present the facts that demonstrate that milk cow dairies

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in the Central Valley discharge to waters of the United States, as well as the many examples of how the effluent limitations and other regulation of discharges to surface waters contained in the Tentative WDRs which require the Regional Board to issue an NPDES permit. Finally, a comparison to the correct decision to issue an NPDES permit to regulate milk cow dairies made by the Regional Water Quality Control Board for the Santa Ana Region is offered as guidance of what this Regional Board must do. However, we begin with an explanation of how the course that the Regional Board proposes to take does a disservice to the dairymen – the very people the Regional Board must work hand-in-hand with to solve the grave threats to water quality in the Central Valley – by failing to insure that a dairyman who follows the letter of this Tentative WDR will be in compliance with the law.

**I. The Tentative WDR Does a Disservice to Dairymen by Failing to Provide Them with Adequate Permit Coverage Required by State and Federal Law**

From a practical standpoint, we are concerned that the action the Regional Board is proposing will leave the dairymen throughout the Central Valley without the safe harbor of knowing that if they comply with the Tentative WDR, they will be in compliance with the law. The consequences of this uncertainty are significant since a failure to obtain a necessary NPDES permit exposes the dairymen to liability under the Clean Water Act for up to \$32,500 per day per violation for unpermitted discharges.<sup>1</sup> During the workshop held by the Regional Board on December 7, 2006 regarding the Tentative WDR, the Regional Board and staff indicated that they liked using the authority under sections 13260 *et seq.* of the Porter-Cologne Act, rather than the NPDES authority in sections 13370 *et seq.* of the Porter-Cologne Act because of the flexibility they perceive it provides in taking on the monumental task of industry-wide regulation of a largely unregulated industry. While the Regional Board may like the flexibility it believes non-NPDES permitting provides, it is unacceptable for the Regional Board to use this process when it fails to provide the requisite legal coverage to the dairymen of California.<sup>2</sup>

As will be explained in detail in these comments, the Clean Water Act and the Porter-Cologne Act require all owners and operators of concentrated animal feeding operations that discharge or propose to discharge pollutants to waters of the United States obtain an NPDES permit that allows for this discharge. *See* 33 U.S.C. §§ 1311(a), 1342; Cal. Water Code §§ 13370 *et seq.* However, although this Tentative WDR requires all dairy owners and operators to comply with its terms, it is not an NPDES permit and thus any discharge from any dairy to a water of the United States, whether allowed by this WDR or not, will be a violation of the Clean Water Act. A couple quick examples to make this point follow.

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<sup>1</sup> 33 U.S.C. § 1319(d).

<sup>2</sup> We are aware of at least one dairy that intends to file, or already has filed, an application for an NPDES permit. We suspect that many other dairies will follow suit, recognizing that only by obtaining and complying with an NPDES permit will they have done everything required to allow themselves to discharge, including discharge storm water runoff, to waters of the United States.

**A. Discharges of Storm Water Will Subject Dairymen to Liability for Unpermitted Discharges in Violation of the Clean Water Act**

The Tentative WDR requires that all dairymen develop and implement a Nutrient Management Plan (“NMP”) for their facility.<sup>3</sup> The NMP must be developed and implement to “prevent adverse impacts to surface and groundwater” that may be caused by the application of wastewater, manure, and other waste products generated at the facility to land owned or under control of the facility owner or operator.<sup>4</sup> The Tentative WDR also prohibits the discharge of storm water runoff to surface waters from these land application areas unless the facility is managed pursuant to the NMP.<sup>5</sup> The Tentative WDR provides a compliance schedule for the development and implementation of the NMP of five years and thus storm water discharges from the land application areas are incapable of causing a violation of the Tentative WDR for five years.<sup>6</sup> The Regional Board has included this NMP requirement in the Tentative WDR to, among other reasons, allow facility owner and operators to take advantage of the agricultural storm water exemption from the definition of point source required by the Clean Water Act and not have to obtain an NPDES permit for these discharges.<sup>7</sup> However, the Tentative WDR fails to provide this assurance.

The agricultural storm water discharge exemption in the Clean Water Act only applies to those facilities that are managed in accordance with a certified NMP.<sup>8</sup> In cases where the facility is not managed pursuant to an NMP, storm water discharges from concentrated animal feeding operations (“CAFOs”), including many of the milk cow dairies in the Central Valley, violate the discharge prohibition of the Clean Water Act. These discharges are only allowed when covered by, and in compliance with an NPDES permit.<sup>9</sup> Because the Tentative WDR does not require that the facility be managed consistent with the NMP for 5 years, which not accidentally is the life of this WDR, facility owners and operators will be required to either seek additional coverage under a separate NPDES permit for these discharges or be exposed to liability under the Clean Water Act. Thus, as proposed this WDR fails to provide dairymen with assurance that compliance with the WDR is compliance with the Clean Water Act.

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<sup>3</sup> Tentative WDR § C.1

<sup>4</sup> Tentative WDR, Attachment C at 1

<sup>5</sup> Tentative WDR § A.12

<sup>6</sup> Tentative WDR, Table 1 (“Schedule for Submittal of Existing Conditions Report, Waste Management Plan, Nutrient Management Plan, Salinity Reports, and Annual Reports.

<sup>7</sup> *Public Workshop, Tentative Waste Discharge Requirements General Order for Existing Milk Cow Dairies*, Staff of Regional Water Quality Control Board for Central Valley Region, Slide 37 (December 7, 2006) (hereinafter “Staff Presentation”).

<sup>8</sup> *See Waterkeeper Alliance, et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 508-09 (2d Cir. 2005) (“*Waterkeeper*”); 40 C.F.R. §§ 122.42(e)(1)(vi)-(ix), 40 C.F.R. § 412.4(c).

<sup>9</sup> *See* 33 U.S.C. § 1311(a).

**B. Discharges in Violation of the WDR Is Also an Unpermitted Discharge in Violation of the Clean Water Act and thus Carries Penalties of Up to \$47,500 Per Day of Violation**

A second example involves the situation of a discharge from the facility which is prohibited by the Tentative WDR – such as a discharge of wastewater from the production area to surface waters in violation of Tentative WDR § A.2. As the Tentative WDR states, a violation such as this is subject to penalties of up to \$15,000 per day of violation.<sup>10</sup> However, in this case, since the discharger does not have an NPDES permit, the discharger is also exposed to liability under the Clean Water Act for for unpermitted discharges and failing to obtain and comply with a required NPDES permit.<sup>11</sup> As noted above, these violations of the Clean Water Act carry a penalty of up to \$32,500 per day per violation.<sup>12</sup> In essence, a facility operator who discharges in violation of the Tentative WDR is subject to double liability under both State and Federal law with a potential exposure to penalties of up to \$47,500 per day per violation.

By failing to make the Tentative WDR an NPDES permit, the Regional Board is doing a terrible disservice to dairymen throughout the Central Valley. Rather than providing a permitting program that will allow the dairymen to get back to doing what they know best, dairy farming, the Tentative WDR requires the dairymen to make difficult decisions about whether their discharges require them to seek additional permit coverage. The simple and logical solution is for the Regional Board to issue an NPDES permit that builds upon many of the requirements and management practices that it proposes to include in the WDR.<sup>13</sup>

**II. The Clean Water Act and the Porter-Cologne Act Require the Board to Issue an NPDES Permit**

Not only is the issuance of this WDR a disservice to the permittees, it is illegal under the Clean Water Act and the Porter-Cologne Act. The Regional Board must issue Waste Discharge Requirements also in the form of an NPDES permit. As explained below, both the Clean Water Act and the Porter-Cologne Act explicitly require the Regional Board to regulate discharges from point sources to waters of the United States with NPDES permits. Following the explanation of legal requirements, these comments highlight the facts in the Regional Board files, as well as in the Tentative WDR fact sheet and findings, that demonstrate the dairies in the Central Valley discharge pollutants to waters of the United States and thus must be regulated with an NPDES permit. Finally,

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<sup>10</sup> Tentative WDR, Standard Provisions and Reporting Requirements § E.1.

<sup>11</sup> See 33 U.S.C. § 1311(a).

<sup>12</sup> 33 U.S.C. § 1319(d).

<sup>13</sup> There are certain aspects of this WDR that would have to be modified to meet the federal NPDES regulations for concentrated animal feeding operations. Because this is not an NPDES permit, technical comments regarding changes to the permit compelled by the federal regulations are not provided. If the Regional Board decides to issue a general NPDES permit for milk cow dairies, we will provide appropriate comments at that time.

we provide an explanation of and comparison to the decision of the Santa Ana Regional Board to regulate dairies with a general NPDES permit as an example of the course of action this Regional Board is obligated to take.

**A. When regulating discharges to waters of the United States, the Regional Board must regulate with an NPDES permit**

Under the Clean Water Act, the discharge of pollutants from a point source to waters of the United States is unlawful unless the discharge is in compliance with, among other things, the effluent limitations established under Section 301 of the Clean Water Act and a permit issued under Section 402 of the Clean Water Act.<sup>14</sup> Section 402 of the Clean Water Act, 33 U.S.C. § 1342, establishes the system by which the Regional Board may allow the discharge of pollutants to waters of the United States. In pertinent part, Section 402 provides

the [Regional Board] may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, *notwithstanding section 1311(a) of this title*, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1217, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the [Regional Board] determines are necessary to carry out the provisions of this chapter.<sup>15</sup>

All NPDES permits must ensure compliance with section 301 of the Clean Water Act, which means that all permits must include the appropriate effluent limitations and guidelines<sup>16</sup> Accordingly, the Clean Water Act only allows for the discharge of pollutants to waters of the United States if done so pursuant to an NPDES permit. A careful examination of (1) the NPDES requirements as applied to delegated States, (2) the representations California's Attorney General made to the EPA when seeking delegation, and (3) the decision reached by the Second Circuit in the *Waterkeeper* case leads to the conclusion that the Regional Board must modify the Tentative WDR to also be an NPDES permit. Each of these topics will be discussed in turn.

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<sup>14</sup> 33 U.S.C. § 1311(a).

<sup>15</sup> 33 U.S.C. § 1342(a)(1) (emphasis added); *see* 33 U.S.C. § 1342(b) (providing for the delegation of permitting authority to a State authority, such as the Regional Board, provided certain conditions are met).

<sup>16</sup> *See* 33 U.S.C. §§ 1311(b) and 1342(a).

1. The Clean Water Act Specifically Requires that All Delegated States Regulate Discharges to Waters of the United States with NPDES Permits

A delegated State such as California has a continuing obligation to implement the NPDES permit program consistent with the requirements set forth in the Section 402(b) of the Clean Water Act.<sup>17</sup> In implementing its NPDES program, a delegated state must “issue permits which apply and ensure compliance with any applicable requirements of section[] 1311.”<sup>18</sup> If a State fails to follow its obligations when implementing the delegated NPDES permitting program “the [EPA] shall withdraw approval of such program.”<sup>19</sup> As such, the onus is on the delegated State to regulate the discharge of pollutants from point sources to waters of the United States pursuant to Section 402. Stated another way, a delegated State may not regulate discharges from point sources to waters of the United States in a manner other than with an NPDES permit.

The Clean Water Act’s implementing regulations also require that delegated states regulate discharges to waters of the United States with NPDES permits. Specifically, in setting forth the scope of the NPDES permitting program, 40 C.F.R. § 122.1(b)(1) states, “the NPDES program requires permits for the discharge of ‘pollutants’ from any ‘point source’ into ‘waters of the United States.’” The regulations also state, “[a]ll State [NPDES] Programs ... must be administered in conformance with [EPA NPDES regulations] except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements.”<sup>20</sup> The EPA NPDES regulations provide that CAFOs, including most if not all of the milk cow dairies regulated by the Tentative WDR, are point sources.<sup>21</sup> As explained below, there is ample evidence that milk cow dairies discharge pollutants and that these pollutants are discharged to waters of the United States. As such, the Clean Water Act’s implementing regulations require that delegated states regulate these discharges with NPDES permits.

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<sup>17</sup> 33 U.S.C. § 1342(c)(2).

<sup>18</sup> 33 U.S.C. § 1342(b)(1)(A).

<sup>19</sup> 33 U.S.C. § 1342(c)(3).

<sup>20</sup> 40 C.F.R. § 123.25(a).

<sup>21</sup> See 40 C.F.R. § 122.23(a) (2002) (“Concentrated animal feeding operations are point sources subject to the NPDES permit program.”); see also *Revised National Pollution Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision*, United States Environmental Protection Agency, 71 Fed. Reg. 37744, 37784 (June 30, 2006) (“Concentrated animal feeding operations, as defined in paragraph (b) of this section, are point sources.”).

2. The Porter-Cologne Act and Attorney General's Statement  
Accompanying California's Request for NPDES Delegation  
Demonstrate that the Tentative WDR Must Also Be an NPDES  
Permit

In addition to the directives contained within the Clean Water Act and its implementing regulations, the Porter-Cologne Act and Attorney General's interpretations of the Porter-Cologne Act's scope and authority mandate that regulation of point source discharges to waters of the United States be done with NPDES permits. Addressing the Porter-Cologne Act first, when California sought delegation of the NPDES program authority from EPA, it submitted, as required by all States seeking delegation, proof that it had the authority to implement an NPDES program that would meet the federal requirements. California's submission included a copy of the Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000 *et seq.*, which provides the State Board and regional boards with NPDES implementing authority. In pertinent part, the Porter-Cologne Act states that the Regional Board "shall ... issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions of the [Clean Water Act]." <sup>22</sup> As explained above, the Clean Water Act requires the permitting authority to issue NPDES permits when regulating discharges to waters of the United States. It follows that the Regional Board's obligation under the Porter-Cologne Act is to regulate discharges to waters of the United States with NPDES permits.

The Clean Water Act and its implementing regulations require a State seeking delegation to submit a statement from its attorney general that explains that the laws of the State seeking delegation provide adequate authority to carry out the NPDES permit program. <sup>23</sup> California's attorney general submitted a statement in 1973 when California first sought delegation and again in 1987 <sup>24</sup> In conducting the analysis of California law and the authority it provides to implement the NPDES permit program, the Attorney General stated that "whenever an NPDES permit is required under the Clean Water Act, waste discharge requirements are required under Chapter 5.5 of the Porter-Cologne Act." <sup>25</sup> Chapter 5.5 of the Porter-Cologne Act establishes the process and authority for issuing waste discharge requirements that are the equivalent of NPDES permits <sup>26</sup>. The directive here is unmistakable – when the Clean Water Act requires NPDES permits, which it does for discharges to waters of the United States, California law mandates that the Regional Board regulate those discharges with NPDES permits.

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<sup>22</sup> Cal. Water Code § 13377

<sup>23</sup> 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.21(a)(3) and 123.23(a)

<sup>24</sup> See generally, *Attorney General's Statement of Legal Authority to Implement a State National Pollutant Discharge Elimination System Program and a State Pretreatment Program*, State of California, Department of Justice (May 11, 1987) ("AG's Statement").

<sup>25</sup> AG's Statement at 19.

<sup>26</sup> See Cal. Water Code 13370(c).

The disclaimer in the Tentative WDR that

[t]his Order is not a National Pollutant Discharge Elimination System Permit issued pursuant to the Federal Clean Water Act. Any facility required to obtain such a permit must notify the Central Valley Water Board,<sup>27</sup>

is not adequate to fulfill the Regional Board's duty to issue NPDES permits when regulating discharges to waters of the United States. Though the obligation to apply for the appropriate permit lies with the discharger, it is the Regional Board's obligation to make the appropriate permits available for those seeking permit coverage. To this end, the AG's Statement provides that the Regional Board has the authority to issue general waste discharge requirements that will govern point source discharges only if "that issuance of general waste discharge requirements for point source discharges would be consistent with the requirements of the Clean Water Act."<sup>28</sup> As demonstrated in these comments, most if not all CAFOs in the Central Valley are point sources and many if not all discharge to waters of the United States. However, the Tentative WDR seeks to regulate point source discharges without complying with the Clean Water Act. This directly contradicts the assurances the attorney general provided the EPA when California sought delegation to implement the NPDES in California.

To be consistent with the Attorney General's assessment of the Regional Board's NPDES authority, the Regional Board should issue a general WDR that is also an NPDES permit. In so doing, the Regional Board will be able to ensure that those dairymen who are obligated to obtain NPDES permits will be appropriately covered. Likewise, should a dairyman believe that his operation does not require NPDES coverage he will be able to seek coverage under individual waste discharge requirements. This will also ensure for the Regional Board that it has made every effort to meet its obligation to regulate all point source discharges with NPDES permits.

Of course there will be dairymen who refuse to obtain coverage under a general NPDES permit, but this is no reason to make the exception – those dairymen who may not need NPDES permit coverage – the rule. The Regional Board now has a report of waste discharge on file for over 95% of the dairies in the Central Valley, so those dairies that refuse to comply, either by submitting to coverage under the general NPDES permit or filing for an individual WDR, should not be difficult to find. Under the scheme that the Regional Board currently proposes, it will be next to impossible for the Regional Board to efficiently identify those facilities that are not complying with their obligations under the Porter-Cologne Act and the Clean Water Act. Only by making a general NPDES permit available will the Regional Board be able to meet its legal obligations.

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<sup>27</sup> Tentative WDR, General Findings ¶ 44.

<sup>28</sup> AG's Statement at 58; *see* Cal. Water Code § 13372



3. The Second Circuit Decision in the *Waterkeeper* Case Does Not Restrict the Regional Board's Authority to Issue a General NPDES Permit

The section of the Information Sheet for the Tentative WDR discussing applicable regulations provides the only explanation for why the Tentative WDR are not an NPDES permit. At page 16 of the Information Sheet, in the one paragraph explanation of how this proposal meets the applicable regulations found in Title 40 of the Code of Federal Regulations, the Regional Board states that "2nd Circuit Court of Appeals ... vacated the requirement for all CAFOs to either apply for an NPDES permit or demonstrate they have no potential to discharge." Apparently, the Regional Board believes that the *Waterkeeper* decision stripped the Regional Board of its authority to issue a general NPDES permit for milk cow dairies in the Central Valley. Provided below is a summary of the *Waterkeeper* decision demonstrating this is not the case.

First, the *Waterkeeper* decision did nothing to change the Regional Board's obligations as a delegated State. Specifically, whether the Regional Board must use NPDES permits when allowing discharges to waters of the United States is a separate issue from whether the EPA properly justified its decision requiring all large CAFOs to seek permit coverage. As set forth herein, the Regional Board is obligated to require NPDES permits for discharges from point sources to waters of the United States.

Second, once that basic principle is understood, while the *Waterkeeper* Court articulated that there are limits on the EPA's authority to require NPDES permits, even when faced with significant, known pollution problems, these limits do not absolve the Regional Board of its responsibility to regulate milk cow dairies with an NPDES permit. In fact, the *Waterkeeper* decision limited EPA's ability in only one respect – namely that the EPA could not require a facility seek permit coverage simply because it has a "potential" to discharge.<sup>29</sup> The court suggested that the EPA could, and seemingly had, marshaled evidence that "such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process."<sup>30</sup>

In this case, as summarized below, the evidence before the Regional Board justifies just such a prophylactic measure to effectively control water pollution from milk cow dairies in the Central Valley. In fact, Findings 21-24 of the Tentative WDR summarize the substantial impact dairy operations have on water quality.<sup>31</sup> Finding 24 concludes that "[t]he waste management systems at these existing dairies are commonly not capable of preventing adverse impacts on waters of the state either because of their outdated design or need for maintenance or both. Historic operation of these dairies has presumptively resulted in an adverse effect on the quality of waters of the state." In

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<sup>29</sup> *Waterkeeper*, 399 F.3d at 505.

<sup>30</sup> *Id.* at 506 n. 22.

<sup>31</sup> Tentative WDR, Findings 21-24.

response to the documented impacts that milk cow dairies have on the waters of California, the Regional Board has issued a prophylactic measure to resolve the problem. Inexplicably however, the Regional Board proposes to take this action without meeting its obligations under the law and issuing an NPDES permit.

Further justification for the Regional Board to issue an NPDES permit in this case is found in the NPDES regulations. The NPDES regulations, which the Regional Board must implement, require that facilities that “propose” to discharge are obligated to obtain permit coverage - the *Waterkeepers* Court did not disturb this duty.<sup>32</sup> There are several ways in which milk cow dairies “propose” to discharge. First, as the Tentative WDR states:

In land applications areas where groundwater is shallow, some Dischargers have installed subsurface (tile) drainage systems to maintain the groundwater level below the crop’s root zone. Drainage from these systems may be discharged directly to surface water bodies or to drainage ditches that discharge to surface water bodies. Some of these systems discharge to evaporation basins that are subject to waste discharge requirements. Discharges from these systems have elevated concentrations of salts, including nitrates and other nutrients. This Order requires Dischargers who have these systems to identify their location and discharge point and to monitor discharges from these systems.<sup>33</sup>

Each of these facilities discharges from a point source to a water of the United States (except maybe those that discharge to evaporation ponds). As such, each of these is either an actual or proposed discharge that the discharger must cover with an NPDES permit, and which the Regional Board is required to regulate with an NPDES permit. A second “proposed” discharge that requires an NPDES permit is any discharge to groundwater that has a substantial nexus with surface waters.<sup>34</sup> Together, these discharges, whether actual or proposed, combined with the evidence of facilities that do discharge discussed below demonstrate that the milk cow dairies in the Central Valley discharge to waters of the United States and must be regulated with an NPDES permit.

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<sup>32</sup> See 40 C.F.R. § 122.21(b).

<sup>33</sup> Tentative WDR, Finding 37.

<sup>34</sup> Compare *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (significant nexus between groundwater and surface water confer Clean Water Act jurisdiction over groundwater) and *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001) (upholding groundwater connection as basis for CWA protection) with *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir.) (finding EPA’s rules do not assert authority to reach discharges to groundwater), *cert. denied*, 513 U.S. 930 (1994).

**B. The Facts Available to the Regional Board Compel Regulation with an NPDES Permit**

1. Considerable information available to Regional Board demonstrates that milk cow dairies discharge pollutants to waters of the United States

The Tentative WDR Information Sheet states that there are approximately 1600 milk cow dairies in the Central Valley.<sup>35</sup> These dairies are large industrial operations and as the Tentative WDR states “[e]ach facility represents a significant source of waste discharge with a potential to affect the quality of the waters of the State.”<sup>36</sup> Presented below are the facts the Regional Board has before it or in its files and that it must consider when evaluating whether these facilities should be regulated with an NPDES permit or, as is proposed here, waste discharge requirements. These facts include: (1) the 2002 Clean Water Act List of Impaired Waterbodies (“303d List”), which identifies the serious impact dairies have on surface water quality in the Central Valley; (2) the information in files the Regional Board maintains – files it turns over to the Dairy Task Force for enforcement – that catalogue hundreds of dairies which discharge pollutants to waters of the United States; and (3) the General Industrial Storm Water Permittee Database which identifies hundreds of dairies that have voluntarily sought coverage for their discharges of storm water associated with industrial activity to waters of the United States.

First, the 303d list demonstrates that dairies discharge to waters of the United States. A water body is required to be identified and placed on the 303d List when the water body is so polluted that it cannot support its beneficial uses.<sup>37</sup> When listing a water body, the listing agency is required to identify those pollutants causing the impairment as well as the source of those pollutants.<sup>38</sup> The State Water Resources Control Board (“State Board”) has tasked the regional boards with identifying those water bodies within each region that are impaired. This Regional Board has identified 8 water bodies in the Central Valley that are impaired by pollutants associated with dairy operations.<sup>39</sup> In 3 of those 8, the Regional Board has identified dairies as the sole cause of the impairment.<sup>40</sup> For the remaining 5, the Regional Board lists activities such as agriculture and grazing, aspects of dairy operations, as the source of the impairment. From this information, the Regional Board is aware that, in general, dairies discharge pollutants to waters of the United States.<sup>41</sup>

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<sup>35</sup> Tentative WDR, Information Sheet at 2.

<sup>36</sup> Tentative WDR, Finding 12.

<sup>37</sup> 33 U.S.C. § 1313(d).

<sup>38</sup> *Id.*

<sup>39</sup> 2002 CWA 303(d) List of Water Quality Limited Segments, State Water Resources Control Board, pages 130-151 (2003) (approved by EPA July 2003).

<sup>40</sup> *Id.* (identifying Lone Tree Creek, Temple Creek, and Avena Drain as impaired by discharges from dairy operations).

<sup>41</sup> A dairy which meets certain threshold requirements, such as size or proximity to surface water bodies, is a CAFO and as such is a point source for purposes of the Clean Water Act. *See* 40 C.F.R. § 122.23(b).

Second, files developed and maintained by the Regional Board identify some of the many dairies in the Central Valley that discharge to waters of the United States. A recent file review<sup>42</sup> yielded the following information – information which demonstrates that the Regional Board has knowledge of some, though not all, of the dairies which discharge pollutants to waters of the United States. The Regional Board maintains files on those dairies that have been issued a notice of violation for off-property discharges of wastewater or other waste.<sup>43</sup> Each of the files maintained by the Regional Board identifies a dairy that is required to obtain an NPDES permit since it discharges pollutants to waters of the United States. Based on our file review, there are at least 56 dairies within the purview of the Sacramento Division of the Regional Board that discharge to waters of the United States. Many of the discharges from these facilities are due to inadequate waste storage capacity at the CAFO, technical failures, or shortcomings in design such as inadequate tailwater return systems. Though these discharges may be sporadic or intermittent, their character as such does not absolve the facilities owners from needing to obtain NPDES permit coverage. *See Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1063 (5th Cir. 1991) (a CAFO that discharges on a “sporadic or intermittent” basis without an NPDES permit remains in a continuing state of violation until it obtains a permit). We must speculate that there are many more dairies that discharge in the Fresno Division since the Fresno Division oversees operations in the most populous dairy counties in the State. Further, the files maintained by the Redding Division undoubtedly identify additional dairies that discharge to waters of the United States. Each of these dairies is obligated to obtain an NPDES permit and the Regional Board is obligated to regulate these dairies with NPDES permits, not the proposed WDR.

Third, the Industrial Storm Water Permit database maintained by the State Board identifies dairies that discharge to waters of the United States. The Industrial Storm Water Permit requires that all facilities subject to effluent limitations and guidelines (“ELGs”) set forth in Subchapter N of Title 40 of the Code of Federal Regulations obtain permit coverage.<sup>44</sup> A dairy is subject to ELGs if it contains more than 700 mature dairy

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Thus, the water bodies that list dairies as source of impairment are impaired by point source discharges – discharges which are subject to permitting under the section 402 of the Clean Water Act.

<sup>42</sup> This file review was limited, on suggestion by the Regional Board staff due to resource limitations in collecting all the files from all three divisions, to those dairies under the purview of the Sacramento Division that have been issued NOV’s for off-property discharges. According to Regional Board staff, the Sacramento Division only maintains files related to dairies operating in Lake, Colusa, Sutter, Yuba, Yolo, Sacramento, Amador, Calaveras, San Joaquin, Stanislaus, and Tuolumne Counties, as well as parts of Sierra, Nevada, Placer, Napa, Solano, Alpine, Contra Costa, Alameda Counties.

<sup>43</sup> These files are incorporated in these comments by reference. As the files demonstrate, these discharges occur at dairies throughout the Central Valley. These files are readily accessible to both the Regional Board and staff and must be considered by the Regional Board when determining how to properly regulate the dairies.

<sup>44</sup> *See Attachment 1 ¶ 1 of Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities, excluding Construction Activities*, Water Quality Order No. 97-03-DWQ, National Pollution Discharge Elimination System (NPDES) General Permit No. CAS000001, State Water Resources Control Board (1997) (“Industrial Storm Water Permit”).

cows.<sup>45</sup> In the Central Valley over 200 dairies have sought coverage under the Industrial Storm Water Permit.<sup>46</sup> Presumably, since the number of dairies with more than 700 mature dairy cattle exceed the number of permittees, those dairies that have obtained coverage did so because they admit that their discharges are to waters of the United States and thus must be covered under an NPDES permit. In any event, that over 200 facilities have sought coverage under the Industrial Storm Water Permit indicates that at least this many facilities discharge to waters of the United States and must continue to maintain NPDES permit coverage even if they are regulated by the Tentative WDR.

The dairies the Regional Board files identify as discharging to waters of the United States represent only a limited number of those dairies that actually discharge. Due to self-proclaimed resource limitations, the Regional Board staff can neither investigate each dairy in the region nor respond to every report or complaint it receives that a dairy is discharging.<sup>47</sup> However, the inability to identify each dairy that discharges, and thus is required to obtain an NPDES permit, is not a justification for failing to issue an NPDES permit to regulate these discharges. Understandably, the Regional Board would like to issue a general permit for dairies since the number of facilities in the region would make regulation by individual permit a burdensome process. However, as set forth in these comments, the proper method for streamlining the process is to issue a general NPDES permit as opposed to the Tentative WDR.

## 2. The Tentative WDR Regulates Discharges to Surface Waters

The Tentative WDR contains many examples of a regulation of the discharge from milk cow dairies to surface waters. In the section titled “Prohibitions,” Section A of the Tentative WDR Order beginning on page 10, the following paragraphs impose limitations on discharges from the milk cow dairies to waters of the United States:

2. The direct or indirect discharge of waste and/or storm water from the production area to surface waters is prohibited [note included in WDR: Discharges of pollutants from the production area to waters of the United States may not lawfully occur except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. NPDES permit coverage is not provided by this Order, but must be obtained separately.]
3. The discharge of waste from existing milk cow dairies to surface waters which causes or contributes to an exceedance of any applicable water quality objective in the Basin Plans or any applicable state or federal water quality criteria, or a violation of any applicable state or federal policies or regulations is prohibited.

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<sup>45</sup> See 40 C.F.R. § 412.30.

<sup>46</sup> See Database on active Industrial Storm Water Permittees available at <http://www.swrcb.ca.gov/stormwtr/industrial.html>.

<sup>47</sup> Personal Communications with Board Staff by commenters.

4. The discharge or disposal of waste from existing milk cow dairies that results in pollution or nuisance is prohibited.
7. All animals shall be prohibited from entering any surface water within the animal confinement area (Title 27 CCR Section 22561).
10. The discharge of wastewater to surface waters from cropland is prohibited. Irrigation supply water that comes into contact or is blended with waste or wastewater shall be considered wastewater under this Prohibition.
11. The application of process wastewater to a land application area before, during, or after a storm event that would result in runoff of the applied water is prohibited.
12. The discharge of storm water to surface water from a land application area where manure or process wastewater has been applied is prohibited unless the manure has been incorporated into the soil and the land application area has been managed consistent with a certified Nutrient Management Plan.

Each of these regulations mimics, or is an exact restatement of effluent limitations guidelines applicable to CAFOs promulgated by EPA and found in Part 412 of Title 40 of the Code of Federal Regulations. The requirement to develop and implement a certified Nutrient Management Plan that ensures, among other things, that wastewater and manure are applied to land application fields at agronomic rates so that excess nutrients do not runoff into area surface waters or infiltrate and pollute groundwater is also an effluent limitation on discharges from these dairies.<sup>48</sup> Other examples of effluent limitations on discharges from milk cow dairies in the Tentative WDR include, but are not limited to, the General Specifications,<sup>49</sup> the Land Application Specifications,<sup>50</sup> and the Provisions.<sup>51</sup> In each of these instances, the Tentative WDR impose regulations on how, when, and under what conditions the milk cow dairy owner or operator may discharge pollutants from the facility to surface waters. These examples all demonstrate that this Tentative WDR regulates discharges to waters of the United States and, as explained herein, when the Regional Board acts to regulate discharges to waters of the United States, it must do so with an NPDES permit.<sup>52</sup>

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<sup>48</sup> See *Waterkeeper*, 399 F.3d at 502-503.

<sup>49</sup> Tentative WDR § B.1-B.3, B.5, B.6, B.12, B.14, B.16-B.18.

<sup>50</sup> Tentative WDR § C.1, C.7 – C.10.

<sup>51</sup> Tentative WDR § E.3.

<sup>52</sup> We urge the Regional Board to compare this situation to the situation faced by its attempted Modification of the City of Roseville's Master Reclamation Permit in 2004. In that case, the Regional Board issued waste discharge requirements, not an NPDES permit, that included effluent limitations on discharges to waters of the United States. Several environmental groups, including some of those submitting comments today, filed an appeal of this decision with the State Board and ultimately filed a petition for writ of mandate in State Court. After lengthy negotiations, the Regional Board acknowledged that it may not regulate discharges to waters of the United States unless it does so with an NPDES permit. As a result, the Regional Board had to reissue the Master Reclamation Permit at great expense to California taxpayers and staff time.

**C. Faced with the Same Issue, the Santa Ana Regional Board Took the Appropriate Path and Issued a General NPDES Permit**

The Regional Board for the Santa Ana Region (“Santa Ana Regional Board”) faces a similar threat to water quality from dairies. Like this Board’s files, the Santa Ana Regional Board’s files contain evidence that dairies throughout that region discharge to waters of the United States. The Santa Ana Regional Board is also faced with resource constraints that limit its ability to investigate each dairy and each discharge. However, despite these constraints and while faced with information much like that before this Regional Board, in 1999 the Santa Ana Regional Board issued a General NPDES permit for discharges from dairies and related facilities.<sup>53</sup> In the Fact Sheet for the Santa Ana Dairy CAFO NPDES Permit, the Santa Ana Regional Board stated:

The Federal Clean Water Act (CWA) states that all concentrated animal feeding operations (CAFOs) are point sources and are subject to NPDES permitting requirements. The CWA defines a CAFO as any AFO [animal feeding operation] that has more than 1,000 animal units<sup>54</sup> .... About 70% of the AFOs in the Region have over 1,000 animal units, and are, therefore, considered CAFOs under the CWA. However, the CWA states that smaller facilities can be designated as CAFOs by the permitting authority ... after considering certain criteria. These criteria include, in part, the location of the AFO relative to surface waters, the slope, rainfall, and other factors that increase the likelihood and frequency of discharges, and the impact of the aggregate amount of waste from many small operations in the watershed that exceed that of larger operations. Board staff has determined that all dairies, heifer ranches and calf nurseries in the Region meet one or more of these criteria, and therefore, should be designated as CAFOs under the CWA. [This Order] designates all dairies, heifer ranches and calf nurseries in the Region as CAFOs, and makes them subject to NPDES requirements.

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<sup>53</sup> See *General Waste Discharge Requirements for Concentrated Animal Feeding Operations (Dairies and Related Facilities) within the Santa Ana Region*, Order No. 99-11, NPDES No. CAG018001, California Regional Water Quality Control Board, Santa Ana Region (August 20, 1999) (“Santa Ana Dairy CAFO NPDES Permit”) and associated *Cease and Desist Order No. 99-65 for Violations and Threatened Violations of Requirements Specified in Order No. 99-11, NPDES No. CAG018001*.

<sup>54</sup> Since the adoption of the Santa Ana Dairy CAFO NPDES Permit the regulatory definition of a CAFO has been modified as set forth in EPA regulations - regulations that the Regional Board is obligated to comply with. See 40 C.F.R. § 122.23(b)(2), (4), and (9); see, *supra*, p. ??-??. The full text of these regulations is attached hereto as Exhibit ?? and incorporated herein by reference. These modifications do not alter the conclusion that most, if not all, of the milk cow dairies in the Central Valley are CAFOs.

Santa Ana Dairy CAFO NPDES Permit, Fact Sheet at 3. The evidence before this Regional Board leads to the same conclusion. Whether a dairy houses the minimum number of animals or is otherwise a CAFO based on consideration of factors set forth in the EPA regulations at 40 C.F.R. § 122.23(b), the proper and legal method for regulating discharges from these facilities is through an NPDES permit. Further, as explained throughout these comments, there is ample evidence before the Regional Board that demonstrates that some, if not all of these facilities discharge to waters of the United States. Since these facilities are point sources and they discharge to waters of the United States, the Regional Board is obligated to regulate them with an NPDES permit.

### **III. Conclusion**

We would again like to thank the Regional Board for applying the extraordinary effort necessarily to develop a laudable set of waste discharge requirements that should go a long way towards solving the substantial pollution problems related to dairy farming in the Central Valley. However, for the reasons stated above, the Regional Board is required to undertake this task with an NPDES permit that builds upon this Tentative WDR. We thank you for the opportunity to comment on the Tentative WDR and look forward to working with the Regional Board to develop an NPDES permit that achieves the same goals – the protection and enhancement of water quality in the Central Valley of California.

Respectfully Submitted,

/s/ Drevet Hunt

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